STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

2006 OAL DETERMINATION NO. 2
(OAL FILE # CTU 06-0525-01)

REQUESTED BY: **COUNCIL FOR ENVIRONMENTAL AND ECONOMIC BALANCE**

CONCERNING: **STATE LANDS COMMISSION RESOLUTION REGARDING ONCE-THROUGH COOLING**

DETERMINATION ISSUED PURSUANT TO GOVERNMENT CODE SECTION 11340.5.

SCOPE OF REVIEW

A determination by the Office of Administrative Law (OAL) evaluates whether or not an action or enactment by a state agency complies with California administrative law governing how state agencies adopt regulations. Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment. Our review is limited to issues of administrative law. OAL has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination.

ISSUE

On May 25, 2006, the Council for Environmental and Economic Balance (Petitioner) submitted a petition to OAL alleging that the State Lands Commission (Commission) issued, used, enforced, or attempted to enforce an underground regulation[1] in violation of Government Code section 11340.5.[2] The alleged underground regulation is a resolution adopted by the Commission on April 17, 2006, entitled "Resolution by the California State Lands Commission Regarding Once-Through Cooling in California Power Plants." The Petitioner specifically challenges the second, third, and fourth resolved clauses of the resolution.

[1] An underground regulation is defined in Title 1, California Code of Regulations, section 250:
> "Underground regulation" means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA.

[2] Unless specified otherwise code references are to the California Government Code.

DETERMINATION

OAL determines that the second, third and fourth resolved clauses in the resolution constitute an underground regulation.

FACTUAL BACKGROUND

On April 17, 2006, the Commission adopted a resolution dealing with the issue of Once-Through Cooling (OTC) in California power plants.

The resolution contains the following resolved clauses.[3] For ease of reference, OAL has numbered the clauses. They were not numbered in the Commission's resolution.

> *1.* ***RESOLVED,*** **by the California State Lands Commission** that it urges the California Energy Commission and the State Water Resources Control Board to expeditiously develop and implement policies that eliminate the impacts of once-through cooling on the environment, from all new and existing power plants in California; and be it further
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> ***2. RESOLVED,*** that as of the date of this Resolution, the Commission shall not approve leases for new power facilities that include once-through cooling technologies; and be it further
>
> ***3. RESOLVED,*** that the Commission shall not approve new leases for power facilities, or leases for re-powering existing facilities, or extensions or amendments of existing leases for existing power facilities, whose operations include once-through cooling, unless the power plant is in full compliance, or engaged in an agency-directed process to achieve full compliance, with requirements imposed to implement both Clean Water Act Section 316(b) and California water quality law as determined by the appropriate agency, and with any additional requirements imposed by state and federal agencies for the purpose of minimizing the impacts of cooling systems on the environment, and be it further
>
> ***4. RESOLVED,*** that the Commission shall include in any extended lease that includes once-through cooling systems, a provision for noticing the intent of the Commission to consider re-opening the lease, if the appropriate agency has decided, in a permitting proceeding for the leased facility, that an alternative, environmentally superior technology exists that can be feasibly installed, and that allows for continued stability of the electricity grid system, or if state or federal law or regulations otherwise require modification of the existing once-through cooling system; and, be it further

[3] The Petitioner did not challenge the whereas clauses, so we do not include them in this discussion.

5. RESOLVED, that the Commission calls on public grantees of public trust lands to implement the same policy for facilities within their jurisdiction; and be it further

6. RESOLVED, that the Commission's Executive Officer transmit copies of this resolution to the Chairs of the State Water Resources Control Board, the California Energy Commission, and the California Ocean Protection Council, all grantees, and all current lessees of public trust lands that utilize once-through cooling.

PETITIONER'S ARGUMENT

The Petitioner challenged resolved clauses 2, 3, and 4 as being underground regulations which are without legal effect unless adopted pursuant to the Administrative Procedure Act (APA), saying in part that:

> The [Commission] Resolution is a regulation that precludes the [Commission] from issuing new leases for power plants that would have once-through cooling structures. The Resolution also precludes the issuance of lease extension or amendments for other power plants depending upon how the power plant is complying with state water quality laws. Additionally, the Resolution requires that the [Commission] include a provision in extended leases that allows the [Commission] to re-open a lease under certain circumstances. The Resolution establishes a set of rules that is generally applicable to all current, or future, power plants that have once-through cooling systems. (Petition, p. 4)

AGENCY RESPONSE

The Commission argues in response that:

> [the] resolution simply puts lessees of state coastal lands, and prospective lessees of state coastal lands, on notice of the Commission's concern for the adverse environmental impacts associated with the use of OTC in power plants and its intention to review closely any future proposed use of OTC in power plant facilities seeking a lease of state land. The terms of each lease of state land are separately negotiated taking into account the activities proposed, the configuration and conditions of the site, and environmental impacts. Each lease is approved by an action of the Commission at a public meeting. The terms of individual existing leases are not changed, nor are the terms of individual future leases established, by the Commission's OTC resolution. (Commission's response, p.1)

UNDERGROUND REGULATIONS

Section 11340.5, subdivision (a), prohibits state agencies from issuing rules unless the rules comply with the APA. It states, in part:

> (a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA].

When an agency issues, utilizes, enforces, or attempts to enforce a rule in violation of section 11340.5 it creates an underground regulation. "Underground regulation" is defined in title 1, Cal. Code Regs. § 250 as follows:

> "Underground regulation" means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA.

OAL is empowered to issue its determination as to whether or not an agency employs an underground regulation pursuant to section 11340.5 subdivision (b). An OAL determination that an agency is using an underground regulation is not enforceable against the agency through any formal administrative means, but it is entitled to "due deference"[4] in any subsequent litigation of the issue.

ANALYSIS

To determine that an agency is in violation of section 11340.5, it must be demonstrated that the alleged underground regulation actually is a regulation as defined by section 11342.600, that it has not been adopted pursuant to the APA, and that it is not subject to an express statutory exemption from the APA. The second and third components of this three-part test may be dealt with summarily. Neither the petitioner nor the Commission contend that the resolution has been adopted pursuant to the APA, or that the resolution is not subject to APA rulemaking requirements due to an express statutory exemption.[5]

Before specifically evaluating whether the three disputed clauses in the resolution are regulations as defined in section 11342.600, we need to address a general issue, raised in

[4] *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244
[5] CA Government Code 11346(a)

the Commission's response to the petition, regarding the nature of this enactment. The Commission argues that the resolution merely puts the lessees on notice that the Commission is concerned about OTC. If the resolution is, in fact, only a statement of the Commission's general intent – in other words, if it does not have regulatory impact – then it is not a regulation and therefore cannot be an underground regulation. In order to determine whether or not the challenged provisions of the resolution may be interpreted as being only statements of intent, we apply rules of statutory construction.[6]

As the United States Supreme Court has noted,

> [I]n interpreting a statute a court should always turn to one cardinal canon before all others. . . .[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, (1992) 112 S.Ct. 1146, 1149
>
> "When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Id.*

If the words of the resolved clauses are clear and unambiguous we do not look to the subjective intent of the Commission to interpret the resolution.

The resolved clauses at issue are clauses 2, 3 and 4:

> ***2. RESOLVED,*** that as of the date of this resolution, the Commission shall not approve leases for new power facilities that include once-through cooling technologies;

This is a simple, declarative sentence. The words and syntax do not lend themselves to multiple interpretations. The Commission says clearly that it shall not approve leases for new power facilities that include OTC technologies. No reasonable argument can be made for any other interpretation. According to Black's Law Dictionary, Fifth Edition:

> "'shall'… is generally imperative or mandatory. … In common or ordinary parlance, and in its ordinary signification, the term 'shall' is a word of command, and compulsory meaning; as denoting obligation…. It has the invariable significance of excluding the idea of discretion, and has the significance of operating to impose a duty which may be enforced, particularly if a public policy is in favor of this meaning, or when addressed to public officials, or where a public interest is involved…."

[6] "Generally, the same rules of construction and interpretation which apply to statutes govern the construction and interpretation of rules and regulations of administrative agencies." *California Drive-In Restaurant Association v. Clark* (1943) 22 Cal.2d 287, 292, 140 P.2d 657, 660

Using the word "shall" in its normal and common usage the challenged provisions of the resolution impose a clear restriction on the Commission's permissible actions. It is not possible to interpret the provision that the Commission "shall not approve leases for new power facilities that include once-through cooling technologies" as a statement that it would simply put "lessees of state coastal lands, and prospective lessees of state coastal lands, on notice of the Commission's concern for the adverse environmental impacts associated with the use of OTC…." The words of the resolution are unambiguous. Therefore our inquiry is complete. Because the language of the resolution is unambiguous, we need not refer to the Commission's intent to interpret it.

Resolved clause #3 states:

> ***3. RESOLVED,*** that the Commission shall not approve new leases for power facilities, or leases for re-powering existing facilities, or extensions or amendments of existing leases for existing power facilities, whose operations include once-through cooling, unless the power plant is in full compliance, or engaged in an agency-directed process to achieve full compliance, with requirements imposed to implement both Clean Water Act Section 316(b) and California water quality law as determined by the appropriate agency, and with any additional requirements imposed by state and federal agencies for the purpose of minimizing the impacts of cooling systems on the environment, …

Again, this resolved clause is clear on its face. The Commission shall not approve new leases or leases for re-powering existing facilities or extension or amendments of existing leases unless specified criteria are met. The criteria are compliance with various state and federal requirements to minimize the impacts of cooling systems. There are no ambiguities in the language which would require OAL to turn to the intent of the Commission to clarify the meaning of the resolved clause.

The third challenged resolved clause is #4:

> ***4. RESOLVED,*** that the Commission shall include in any extended lease that includes once-through cooling systems, a provision for noticing the intent of the Commission to consider re-opening the lease, if the appropriate agency has decided, in a permitting proceeding for the leased facility, that an alternative, environmentally superior technology exists that can be feasibly installed, and that allows for continued stability of the electricity grid system, or if state or federal law or regulations otherwise require modification of the existing once-through cooling system; …

This resolved clause also is, on its face, clear. The Commission shall require specified provisions in extended leases. There is no need or useful purpose to delve further to divine the Commission's intent.

We must, therefore, accept the meaning of the unambiguous language of the resolution – that the Commission shall take the specified actions in the specified situations. The language employed in the resolution admits no other interpretation and requires no resort to the intent of the drafters to be understood.

We next turn to the narrower legal question of whether the clauses constitute regulations under the APA. A regulation is defined in section 11342.600 as:

> ". . . every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

In *Tidewater Marine Western Inc. v. Victoria Bradshaw*, (1996)14 Cal.4th 557, 571, the California Supreme Court found that:

> A regulation subject to the Administrative Procedure Act (APA) (Gov. Code § 11340 et seq.) has two principal identifying characteristics. First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. Second, the rule must implement, interpret, or make specific the law enforced or administered by the agency, or govern the agency's procedure (Gov. Code, § 11342 subd. (g).)

The first element of a regulation is whether the rule applies generally. The resolved clauses in question here apply to all holders of leases, both present and future. While this resolution may not apply to all stakeholders of the Commission, it applies to all members of a clearly identified class of persons.

The Commission's response to the petition points out that the number of leases for power plants is very limited. It says that there are only ten leases that are under the Commission's jurisdiction and are subject to leases issued by the Commission, not the group of 21 coastal power plants cited by the Petitioner. Of these ten leases, three are in "holdover" status and will continue operating until new leases are negotiated. The remaining seven each have several years remaining on their terms. The Commission argues that the resolution affects none of these leases because it will negotiate each lease on a case-by-case basis. The language used in the resolution contradicts the Commission's argument. The Commission has created a clearly identified class of at least ten leases to which the resolution applies. Furthermore, resolved clauses #2 and #3 apply to future new leases. Thus they would apply generally to an indeterminate number of future applicants, not just to the ten present lessees identified by the Commission.

The Commission argues that it will negotiate each lease on a case-by-case basis and that, if appropriate, it might approve a lease that includes Once-Through Cooling. Such a lease, however, would explicitly violate the language of the resolution. The Commission cannot negotiate a lease that permits the use of Once-Through Cooling without violating the terms of the resolution. To argue otherwise is to argue, in effect, that the resolution does not exist. The mandatory and comprehensive language of the three challenged clauses does not admit an interpretation that leases will be evaluated on a case-by-case basis.

The first element required by *Tidewater* is therefore met. The language of the challenged clauses can only be interpreted as creating a rule that applies generally.

The second element is that the rule must implement, interpret or make specific the law enforced or administered by the agency, or govern the agency's procedure. The Commission has broad powers to manage and administer state property in the best interest of the state. The Commission is authorized by Public Resources Code sections 6201, 6216 and 6301, to administer, sell, lease and dispose of public lands owned by the state or under its control. As noted in the Commission's response to the petition:

> In exercising this authority, the Commission is acting as the state's trustee and manager of state property. In considering any proposal for issuance of a lease, the Commission is making a decision, as any property owner would, as to whether the particular proposal is of benefit to the State. The Commission also includes in the terms and conditions of each lease provisions to protect the public health and safety. Each individual lease proposal must therefore be reviewed on its own merits. This is by necessity a case-by-case consideration of lease terms and conditions, and, ultimately entails a lease-by-lease approval by the Commission. (Commission's response, p. 3)

It is well within the Commission's statutory mandate to grant or refuse to grant a lease, or to require provisions to be included in a lease. Although the Commission makes many decisions on a case-by-case basis, not all provisions in the leases are individually negotiated. The Commission's own regulations include several contractual provisions that apply to all leases. For example, title 2, Cal. Code Regs., section 1911 sets out the interest and penalty payments criteria for leases. Section 2003 establishes rental rates for leases of surface lands and section 2004 establishes maximum terms for such leases.

A resolution by the Commission that it shall make standard decisions in the circumstances specified in the resolution clearly implements, interprets or makes specific the law enforced or administered by the Commission or governs the Commission's procedure. It does so in the same manner as the Commission's existing regulations specifying that each lease shall include certain standardized provisions. The second element expressed in *Tidewater* is met.

Having determined that the challenged clauses comprise regulations under *Tidewater,* we must also consider whether they are legally exempt from adoption pursuant to the APA. Even though it was not adopted pursuant to the APA, a regulation does not meet the definition of "underground regulation" if it is "subject to an express statutory exemption from adoption pursuant to the APA" (title 1, Cal. Code Regs. 250(a).)

The provisions of the California Public Resources Code which govern the Commission do not contain any general provision allowing the Commission to adopt rules outside of the APA process. Therefore, any express statutory exemption from APA rulemaking requirements, if it existed, would have to be specific to the type of regulation contained in the challenged resolved clauses. No such statutory exemptions are apparent that might apply to clause #2 or clause #4. Both are unambiguous declarative sentences regarding policies to be followed by the Commission generally.

It might be argued clause #3 is the only legally tenable interpretation of the law and is, therefore, exempt from the APA adoption requirement pursuant section 11340.9(f). This section provides as follows:

> 11340.9 This chapter does not apply to . . .
>
> (f) A regulation that embodies the only legally tenable interpretation of a provision of law.

On the surface, the third resolved clause appears merely to say that the Commission will only approve leases which comply with governing law – in other words, that it will not approve illegal leases. If this is what the clause provides, it could hardly be controversial. It would, presumably, be unlawful for the Commission knowingly to approve an illegal lease. If clause #3 was limited to providing that the Commission will not approve leases that violated the state and federal laws or statutes with which they are required to comply, it could be considered the "only legally tenable interpretation" of those laws and statutes to require compliance with those laws and statutes before a lease is granted or extended.

In this case, however, the resolved clause goes beyond requiring leases to comply with statutes and regulations. It mandates compliance with "any additional requirements imposed by state and federal agencies for the purpose of minimizing the impacts of cooling systems on the environment." This language would appear, for example, to mandate compliance with unenforceable underground regulations issued by another agency. It would include compliance with laws and regulations that may not clearly apply to once-through cooling systems but might be interpreted in that way by the Commission. The language is too broad and unclear to fall squarely into the "only legally tenable" exemption from the APA in Government Code section 11340.9. Language which leaves itself open to various interpretations cannot be the "only legally tenable" interpretation of a provision of law.

The Commission also argues that the resolution "cannot bind the current Commission or subsequent Commissioners in exercising their continuing authority and obligation in carrying out their responsibilities." (Commission's response, page 4.) This assertion may or may not be true, but it is irrelevant to the question of whether or not the Commission has issued an underground regulation. Under section 11340.5, a state agency enactment that creates a regulation, that has not been adopted pursuant to APA rulemaking and that is not subject to an express statutory exemption from APA rulemaking, is an underground regulation. The fact that the enactment may or may not be legally suspect otherwise is not relevant to analysis of compliance with section 11340.5.

Whether or not this resolution can legally bind subsequent actions by the Commission is a legal question beyond the scope of this determination. This question could only be resolved if, for example, the Commission approved a lease for a new power facility that included once-through cooling technologies and the approval was subsequently challenged because it violated the resolution. OAL cannot determine whether that challenge would succeed, but for our purposes the question is irrelevant. Section 11340.5 prohibits a state agency from issuing an underground regulation. In adopting this resolution the Commission has issued an underground regulation. The questions of whether or not the Commission has enforced it, and whether or not an attempted enforcement would be legally valid, are irrelevant to the question of whether or not it has been issued.

There is a strong policy reason for prohibiting the mere issuance of an underground regulation. The regulated public appearing before a state agency has the right to know what the rules are and to expect the agency to obey those rules. In this case, the issuance of this resolution has the effect of telling the regulated public that any application for a permit in violation of the provisions of the resolution will not be approved. The existence of this underground regulation as an apparent limitation upon allowable applications has regulatory impact without further enforcement action by the Commission. Whether such enforcement action, if it ever occurred, would be legally valid is unrelated to the regulatory impact that the resolution has by virtue simply of being issued.

The Commission further argues that a resolution need not be a regulation. OAL agrees that a resolution need not always be a regulation. Indeed, the resolution that is the subject of this determination would not appear to be a regulation if clauses 2, 3 and 4 were not included. The nomenclature of the document in question is not relevant to the discussion of whether the document is or is not a regulation. This issue is not what the enactment is called; it is whether the enactment has regulatory effect. In this case, a leaseholder reading the resolution would believe that the Commission is binding itself to take the actions specified in the resolution. As noted in the Petitioner's rebuttal to the Commission's response:

> In essence, the [Commission]'s response asserts that OAL and the regulated community should "pay no attention to that man behind the curtain", because the Resolution does not mean what it says, and that future

> Commissions are free to ignore the Resolution. This, however, is obviously *not* what the Resolution states. Instead, the Resolution does the exact opposite. The [Commission] clearly intended to set forth a general standard as to how the [Commission] would treat lease applications for power plants that use OTC systems. (Petitioner's rebuttal to the Commission's response, page 4.)

Whether or not an action or enactment by a state agency constitutes an underground regulation is purely a legal issue. It does not depend upon whether the agency that issues the underground regulation actually attempts to enforce it, or whether such an attempt would ultimately be successful. It does not depend upon the form or name of the action or enactment. While these matters may or may not have practical significance for the regulated public, they have no relevance in the legal determination of whether or not an underground regulation exists.

CONCLUSION

In view of its unambiguous language, OAL must conclude that the clauses two, three and four of the resolution constitute underground regulations. OAL notes that if the Commission meant only to express its concern about OTC systems, it could have used language that did not, on its face, create an explicit rule. By adopting a resolution that uses unambiguous language to establish an explicit rule, the Commission has issued an underground regulation in violation of section 11340.5.

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November 8, 2006